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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File:

Office: VERMONT SERVICE CENTER

Date:

JUN 21 2002

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was originally approved by the Director, Vermont Service Center. Upon further review, the director properly served the petitioner with a notice of intent to revoke the approval of the petition and ultimately revoked the approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the state of New York in January of 1997. The petitioner is engaged in the cigar accessories trade. It seeks classification of the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director ultimately revoked approval of the petition because review of the record revealed the petitioner had not established that the beneficiary was engaged in a primarily managerial or executive position.

On appeal, counsel for the petitioner asserts that the Service's revocation of the approval of the petition is in error.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of

the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

The issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day

operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. 204.5(j)(5).

In a letter submitted with the initial petition, the vice-president of the petitioning company stated that the beneficiary had been president of the company since December of 1997. The letter described the beneficiary's duties as follows:

[The beneficiary] oversees the development and expansion of our U.S. cigar accessories company. He plans and establishes company policies and business procedures. He presides over all corporate activity and develops policies toward customers and public, including public relations. He coordinates with our parent company in China. He currently presides over the company and myself, [the vice-president], and I report to him on business activity, including finances and opportunities. Under [the beneficiary's] leadership, we plan to continually expand over the coming year and hire additional workers to relieve [the

beneficiary] and myself from some nonmanagement [sic] duties that are necessary to perform while launching and nurturing a company.

[The beneficiary's] duties, if broken down on a weekly basis, include studying, analyzing & setting company objectives and policy for 10-15 hours weekly including reviewing finances and deciding on company expenditures and investments, reviewing sales figures and client information to decide on product line development strategies, meeting with me to review company progress, problems & steps to take; analyzing promotional strategy & weighing the merits of existing & potential products the company will carry. [The beneficiary] spends another 4 hours preparing weekly and monthly reports and communicating with the Board of Directors of our parent company in China, reviewing the state of our company with the Board and its future development; 3 to 4 hours meeting with corporate clients and possible suppliers of new cigar products which we are interesting [sic] in merchandising; 1 to 2 hours per week attending industry conferences and promotional events; reviewing business proposals and contracts and entering into agreements as President of the company, which if broken down on a weekly basis, are approximately 3 to 5 hours per week. He also spends approximately 2-4 hours per week giving me instructions & guidance and reviewing my work.

In the notice of intent to revoke, the director stated that although the petitioner had indicated that the beneficiary's duties were for an executive position, the record did not support a finding that a preponderance of the beneficiary's duties are primarily executive or managerial in nature. The director requested that the petitioner submit additional evidence that the beneficiary had been and would be engaged in a primarily managerial or executive position with the petitioner.

In response, the vice-president of the petitioning company restated the previous description of the beneficiary's job duties. The vice-president also provided a position description for himself as follows:

[The vice-president] sees to daily operations of the business - from leasing space to receiving quotes and keeping company and operational costs to a minimum. He spends more time in the office than [the beneficiary] and answers most questions of interested buyers and sellers who are attracted by our advertising, [the beneficiary's] marketing, or by word-of-mouth. He is on the telephone at least 2-3 hours a day, or 10-15 per week. He meets with [the beneficiary] everyday that [the beneficiary] is in the office for instruction and

guidance on how to deal with specific situations that may arise on the day on an average of 2-4 hours per week - gives training, instruction, work assignments and guidance to our sales/office assistant . . . for approximately 6 hours per weeks [sic] broken into 20 minutes to think up and map out assignments, 15 minutes to give out the assignments at the beginning of the day for [the office/sales assistant], a further 15-20 minutes during the course of the day to answer questions by [the office/sales assistant] on the assignments, 20 minutes at the end of the day to review the work assignments and to okay them for copying and eventual signature by [the beneficiary] or [the vice-president]. As the company expands and hires additional workers, [the vice-president] will supervise the other employees and assign projects and tasks daily. The total amount of time that he will spend in overseeing the work of employees will correspondingly increase. [The vice-president] further tracks and follows-up on sales, imports, leads and agreements including coordinating supplier production speed and taking responsibility for our company's shipments to customs. This takes him about 5-7 hours per week, which includes communicating with exporters and suppliers overseas via telephone and fax for 6 to 8 hours weekly. [The vice-president] also fulfills customs requirements and deals with brokers for approximately 2 hours per week; forecasts company growth and assets for 2 to 3 hours weekly before meeting with [the beneficiary]; gauging sales figures, customer reaction and cash flow; analyzes company operations reports for [the beneficiary] - sometimes written and sometimes verbal before meetings for an average of 3 hours per week; prepares all banking transactions for I [sic] hour weekly, assists [the beneficiary] in promoting the company and with public relations for an average of 2 hours per week, manages all billing and receiving, as well as customer orders and specifications for 4 to 6 hours weekly. [The vice-president] has authority to recommend personnel decisions and, when [the beneficiary] travels to China on business, [the vice-president] temporarily assumes most of [the beneficiary's] responsibilities and powers.

The vice-president also provided a position description for the sales/office assistant as follows:

Answers telephones, opens mail, take [sic] phone orders and performs other general administrative functions such as writing routine letters, typing, filing and filling out forms, maintaining office supplies, making copies and maintaining office equipment and taking on

other tasks as assigned by [the beneficiary] and [the vice-president], for 20 hours each week.

After considering the petitioner's response, the director revoked the approval of the petition. The director noted that the description of the job duties for the petitioner's staff was insufficient to establish that the beneficiary's position had been and would be executive or managerial in nature. The director noted the petitioner's statements regarding its growth but stated that eligibility for the benefit sought must be established at the time of filing the petition. The director further determined the record failed to demonstrate that the United States office had sufficient business and staffing that would require the services of an individual primarily engaged in executive or managerial duties as of the time of filing the petition and as of the present time. The director concluded that the approval of this petition initially and the beneficiary's new office L-1A extension petition were approved in error.

On appeal, counsel for the petitioner asserts that the re-adjudication of the executive/managerial issues that had been decided in past adjudications is improper in the absence of fraud or gross error. Counsel also asserts that the Service's emphasis on the size of the petitioner violates precedential decisions of the Service and the federal courts. Counsel further asserts that the Service's focus on the inadequacy of the beneficiary's position description is a "red herring when seen against the background of I-140, EB-13 statements approved in the past." Counsel also contends that the Service has not properly considered the company's growth after the date of filing the petition. Counsel further contends that the Service has not met its burden of proof of "good and substantial cause" in revoking the I-140 petition.

Counsel's assertion that the Service must approve an I-140 petition when the executive and managerial issue has been favorably decided in previous adjudications unless fraud or gross error is shown is not persuasive. The petitioner must establish eligibility for each petition filed. The Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the Service or any agency must treat acknowledged errors as binding precedent. Sussex Engg. Ltd. v. Montgomery 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988). The service center has acknowledged in this proceeding that the previous approvals were made in error. Moreover, the Administrative Appeal Office's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Just as district court decisions do not bind the court of appeals, service center decisions do not control the Administrative Appeals Office. The

Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the rulings of service centers that contradict the position of the Administrative Appeals Office. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000).

Contrary to counsel's assertion that the Service's focus on the inadequacy of the petitioner's description of the beneficiary's job duties is a "red herring," the Service looks first to the petitioner's description when determining the managerial or executive nature of a position. See 8 C.F.R. 204.5(j)(5). In response to the director's notice of intent to revoke, the petitioner did not submit any expansion or clarification of the beneficiary's job duties, but instead relied on the previous description provided. Although the previous description was fairly long, the first paragraph provides only a broad overview of the beneficiary's responsibilities. The second paragraph provides more detail regarding the beneficiary's weekly activities but is more indicative of an individual primarily providing necessary services to the company. The beneficiary spends three to four hours meeting with clients and suppliers, one to two hours attending industry conferences and three to five hours reviewing business proposals and entering into contracts. These duties reflect an individual performing the necessary marketing duties to maintain the company's business. The ten to fifteen hours the beneficiary spends on studying, analyzing and setting company objectives and policy even with the further detail provided is not sufficient to provide a clear understanding of exactly what the beneficiary is doing during those hours. The Service is unable to determine from these statements whether the beneficiary is performing managerial or executive duties with respect to the activities described or whether the beneficiary is actually performing the activities. The petitioner has not provided supporting documentation of the four hours the beneficiary allegedly spends preparing reports and communicating with the parent company. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, the vice-president notes in his job description that the beneficiary is not always in the office. This statement raises questions regarding the beneficiary's primary duties. When reviewing the number of hours the beneficiary spends performing the various duties described, the beneficiary is only spending nineteen to thirty-four hours per week serving the petitioner. Again, when reviewing the type of duties described and the number of hours devoted to the duties, the petitioner has not established that the primary duties of the beneficiary are managerial or executive in nature.

Counsel's citation to various cases is injudicious. Counsel has not adequately described how the facts of the instant petition are in any way analogous to the cases cited. Moreover, the

unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was more than two years old and claimed to have a gross annual income of \$444,897 for the 1998 tax year. The firm employed the beneficiary as its president, as well as a vice-president and an office assistant. The vice-president stated that the company's plan was to expand and hire additional workers to relieve the beneficiary and himself from some non-management duties. Based on this statement and the description of duties provided for the three employees, the petitioner has not established its need for the services of two purported executive employees and a part-time clerk. Rather, at the time of filing, the reasonable needs of the petitioner required its two purported executives to engage in non-qualifying duties. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

Contrary to counsel's contention that the Service has not taken into consideration the company's growth since the date of filing the petition, a petitioner must establish eligibility at the time filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel's contention that the Service has not met its burden of proof of "good and substantial cause" in revoking the I-140 petition is not persuasive. Section 205 of the Act, 8 U.S.C. 1155, states that "[t]he Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204 [of the Act]." A notice of intent to revoke approval of a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. Matter of Li, 20 I&N Dec. 700, 701 (BIA 1993); Matter of Estime, 19 I&N Dec. 450 (BIA 1987); Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of a petitioner's approval, provided the director's revised opinion is supported by the record. Matter of Ho, supra at 590. In the present case, the director did raise sufficient factual issues to support the revocation. The notice of intent to revoke and the subsequent revocation were based on evidence that was in the record at the time the notice was issued. The petitioner did not submit sufficient evidence to rebut the notice of intention to revoke.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.